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No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

TROPIGAS, S.A.,

Petitioner,

- versus -

RICHARD ANDERSON, et al.,

Respondents.

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

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Petitioner, Tropigas, S.A., hereby replies to the Brief of Respondents in Opposition to the Petition for Certiorari.

ARGUMENT

A review of the factual statements advanced by Respondents in their statement of the case reveals that Respondents do not contradict the vast majority of the facts advanced by Petitioner. As it is the facts which are most critical to the analysis of the issues raised herein, the failure of the Respondents to contradict Petitioner's facts is significant. 1/

Respondents, in their reply, have challenged only five of the twenty-eight factual statements advanced by Petitioner

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1/ Petitioner is mindful of the general proposition that the Court will not grant certiorari to review evidence and discuss specific facts. See, United States v. Johnston, 268 U.S. 220 (1925); Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924); Houston Oil Co. v. Goodrich, 245 U.S. 440 (1918).

and have not directly contradicted any. [2] None of the facts challenged by Respondents are of significant importance to the resolution of the issues before the Court.

Notwithstanding Respondents' failure to respond to Petitioner's facts, this failure has not constrained the Respondents from attempting to distort other facts and mislead the Court by the creation of "facts" which have no factual basis. [3] Conspicuously absent are any

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2/ Petitioner's statements of fact which have gone unchallenged are listed in the appendix hereto at App. p. 65a. The pagination of the appendix to this Reply Brief is continued sequentially from the appendix to the Petition for Writ of Certiorari.

3/ Respondents have used, word for word, the same "factual statements" which were used in their Answer Brief to the District Court of Appeal and which were the subject of a detailed Motion to Strike which addressed the extensive factual inaccuracies contained in the Answer Brief. This Motion to Strike is reproduced in its entirety in the Appendix herein at App. p. 70a.

quotations or other references to support the factual assertions made by Respondents. 4/

The most egregious and glaring fallacy put forth by Respondents is that Petitioner is a resident of Dade County, Florida. This proposition is advanced without any substantial basis in fact and flies in the face of the undisputed facts.

1. Tropigas, S.A. is a Panamanian corporation which has never solicited business in Florida [App. p. 20a];

2. Tropigas, S.A. owns no real property in Florida. [App. p. 20a];

4/ As a result of Respondent's failure to provide an appendix containing the factual references which allegedly support the factual statements made in the Brief in Opposition, it is impossible for Petitioner to demonstrate that the Respondent's factual statements are not supported by their own references other than by inclusion of the Motion to Strike appended hereto.

3. Tropigas, S.A. has never earned any income in Florida [App. pp. 12a-13a, 29a];

4. Tropigas, S.A. has never been authorized to do business in Florida [App. p. 10a];

5. Tropigas, S.A. has no employees in Florida [App. p. 19a].

Respondents' inaccurate factual assertions notwithstanding, it is difficult to conceptualize how a corporation can be resident in a locale where it has no employees.

Respondents alternatively try to establish "minimum contacts" on the basis of a minute amount of purchases made by Tropigas, S.A. in Florida. Both the

record [5] and the holdings of this Court [6] debunk the effort to show minimum contacts.

Petitioner agrees with the statement made by Respondents that "[A] corporation is deemed to be a resident of the state where it is incorporated and the state where it has its principal place of business. [Brief in Opposition p. 9; Emphasis added]. The undisputed facts demonstrate convincingly that Tropigas, S.A. is not a resident of Florida. [7] These facts amply

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5/ Tropigas, S.A.'s total purchases in Florida for the years 1980-1983 amounted to less than $10,000 and the vast majority of purchase made are made outside of Florida. [App. p. 36a].

6/ Helicopteros Nacionales De Colombia, S.A. v. Hall, 104 S.Ct. 1868 (1984); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923).

7/ Petitioner notes that Respondents provide no citation to any authority defining "resident" or any authority that would support the proposition advanced that Tropigas, S.A. is properly subject to the in personam jurisdiction of the courts of Florida based on S.A.'s activities as a "resident" of Florida.

demonstrate that Tropigas, S.A. does not have sufficient minimum contacts with the State of Florida such that the maintenance of in personam jurisdiction over it does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

The undisputed facts also demonstrate that the Respondents' cause of action arose in Jamaica and not out of Petitioner's activities in the State of Florida. Respondents argue, without any substantive support, that Petitioner's contacts constitute a continuous and systematic general business presence in Florida. 8/ However, this action did not

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8/ Respondents even go as far as to concede that whatever part of its general business Petitioner is carrying on in Florida that this business is "limited." Respondents' Brief in Opposition, p. 14.

arise out of Petitioner's activities in Florida, and this compels the conclusion that Florida cannot constitutionally maintain in personam jurisdiction over Tropigas, S.A.

As this Court in Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 445 (1951) stated, the exercise of in personam jurisdiction over a foreign corporation must be "reasonable and just" as that term relates to the activities of the foreign corporation within the forum. 9/ The imposition of in personam jurisdiction over Tropigas, S.A. by the courts of Florida cannot be considered "reasonable and just" where the accident in question occurred in Jamaica, involved citizens and residents of Jamaica, and was allegedly

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9/ The court in Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S.Ct. 1868, 1872 (1984) quoted this language with approval.

caused by equipment not used or procured in the United States. Permitting in personam jurisdiction under these circumstances will open a floodgate of litigation brought by foreign plaintiffs injured in foreign countries using foreign products against any corporation with the remotest connections with the United States. There is nothing "reasonable and just" about this prospect.

CONCLUSION

Considerations of due process, i.e., individual motions of fair play and substantial justice, compel the conclusion that this action is not properly brought against Tropigas, S.A. in the State of Florida. Certiorari should be accepted and this case be remanded for dismissal in accordance with Helicopteros Nacionales

De Colombia, S.A. v. Hall, 104 S.Ct. 1868 (1984).

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DATED: November 8, 1984.

CERTIFICATE OF SERVICE

I, CHRISTIAN D. KEEDY, being over the age of 18 years, hereby certify that I have this eighth day of November, 1984, served three copies of the foregoing Brief of Petitioner in Reply to Brief of Respondents in Opposition to Petition For Writ Of Certiorari to the District Court of Appeal, Third District to all counsel of record listed below with their mailing addresses, by mailing said copies in sealed envelopes, first class postage prepaid, deposited at the United States Post Office located at One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida.

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APPENDIX

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LISTING OF FACTS NOT DISPUTED BY RESPONDENTS

1. The accident alleged occurred in Jamaica.

2. The Respondents were citizens and residents of Jamaica at the time of the accident and are still citizens of Jamaica.

3. The valve, cylinder and gas alleged to have caused the accident were purchased, delivered and used in Jamaica.

4. Respondents have alleged and Petitioner agrees that Jamaican law applies.

5. The majority of the actual and potential witnesses reside in Jamaica, including occurrence witnesses, medical witnesses, background witnesses and technical witnesses.

6. Petitioner has no means of obtaining compulsory process over witnesses

or other evidence located in Jamaica [App. pp. 36a-37a] while Respondents have obtained orders from the Florida trial court requiring Petitioner to produce witnesses and documents from Jamaica in Florida.

7. Petitioner has no means of impleading third parties in Jamaica such as the manufacturer of the gas which is the Jamaican government, or the distributor of the cylinder involved in the alleged accident, which does business solely in Jamaica.

8. TROPIGAS, S.A. has never sold any products in Florida. [App. p. 29a].

9. TROPIGAS, S.A. has never solicited any business in Florida; [App. p. 29a].

10. TROPIGAS, S.A. has never earned any income in Florida; [App. pp. 17a-43a].

11. TROPIGAS, S.A. has not been able to transfer any earnings out of its

Jamaican branch for six years because of currency control in Jamaica. [App. p. 57a].

12. TROPIGAS, S.A. has no employees in Florida; [App. p. 28a].

13. The common officers of TROPIGAS, S.A. and TROPIGAS INTERNATIONAL CORP. are not compensated for any services provided to TROPIGAS, S.A., and these common officers do not run the business activities of TROPIGAS, S.A. [App. pp. 28a, 38a-39a, 61a].

14. TROPIGAS, S.A. has never been authorized to do business in Florida. [App. p. 14a].

15. TROPIGAS, S.A. is not engaged in business anywhere in the United States. [App. pp. 19a, 28a].

16. TROPIGAS, S.A. owns no real property in Florida. [App. p. 29a].

17. The vast majority of purchases made by TROPIGAS, S.A. are made outside of Florida, [App. p. 53a], and the few purchases made through Florida are for items not obtainable elsewhere. [App. p. 63a]. In the years 1980-1983 these purchases did not exceed a total of $10,000. [App. p. 54a].

18. The operations of TROPIGAS S.A. are controlled by its division managers, who are located in each country where it operates and they direct the daily financial and operational activities in each country. [App. p. 28a].

19. TROPIGAS, S.A. reports certain financial data to TROPIGAS INTERNATIONAL CORP. which provides data processing services, but each branch of TROPIGAS, S.A. has its own bookkeeping department and maintains its own separate accounting records. [App. p. 62a].

20. The local division managers are equal to chief operating officers for the operations in each country and are delegated complete authority to run their division independently. [App. p. 61a].

21. Regulations promulgated by the government of Jamaica control the types of valves and cylinders used in Jamaica by TROPIGAS, S.A. [App. p. 50a].

22. Cylinders for use in Jamaica have never been purchased by TROPIGAS, S.A. in Florida. [App. pp. 52a-53a].

23. The limited services provided to TROPIGAS, S.A. by its parent company in Florida are charged to and paid for by TROPIGAS, S.A. [App. p. 56a].

IN THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 83-2854

TROPIGAS, S.A.,)

Appellant,)

vs.)

RICHARD ANDERSON, et al.,)

Appellees.)

MOTION TO STRIKE APPELLEES' ANSWER BRIEF

The Appellant, TROPIGAS, S.A., in accordance with Rules 9.300 and 9.410, of the Florida Rules of Appellate Procedure moves to strike the Answer Brief because it contains facts which are not supported by the record. Further, the Appellees' statement of the case and facts is inaccurate, misleading, and in many respects not supported by the Appellees' citations. Finally, the Appellees have included in their factual citations references to undated documents and depositions taken in

other litigation many years before the incident which is the subject of this litigation. Appellees' statement of the case and facts is also argument and must be stricken.

The Appellees' Answer Brief is misleading and the Appendix is incomplete. The Appellees have selected transcript excerpts which are not a fair or accurate presentation of the testimony given by witnesses Appellees deposed concerning the jurisdictional issues which are the subject of this appeal. Additionally, the Appellees have neglected to inform the Court that they have included only small excerpts of witnesses' testimony which has in some cases been taken out of context. Contrary to Appellees' Index to Appendix, not one single complete deposition has been furnished to the Court.

In total disregard of Rule 9.210, Florida Rules of Appellate Procedure, the Appellees have failed throughout important sections of their statement of the case and facts to refer to relevant pages in the record, which in this case is the Appendix. Under Rule 9.130, Florida Rules of Appellate Procedure, each party is required to include in an appendix filed with its brief those portions of the record before the trial court which each party relies upon in its brief. Many statements made by the Appellees with what purport to be citations are in fact unsupported by the portion of the appendix cited. Many of the statements are not only unsupported by any portion of the Appendix, but are simply incorrect. Appellees' flagrant violations of the Appellate Rules infect the entire brief. These violations operate to mislead the

Court and to prevent an orderly and complete appellate review.

The inaccuracies and unfounded statements by the Appellees begin on page 1 of their Answer Brief. There they assert that the trial court held that Tropigas, S.A. has its principal place of business in Coral Gables. This assertion is completely unsupported. Equally unsupported is Appellees' assertion on page 2 of their Brief that the court based its ruling on certain legal precedent. The trial court merely denied Tropigas, S.A.'s Motion to Dismiss without making any type of finding or basing it on any legal principal. (See App.A. 70, Order Denying Motion to Dismiss). 1/ Further, the Appellees' inclu-

---

1/ The Appellant's Initial Brief Appendix will be referred to herein as App.A. ___, and the Appellees' Answer Brief Appendix will be referred to as A.A. ___. Reference to Appellant's Appendix to this Motion will be referred to as M.A. ___.

sion of legal argument in their statement of the case and facts on page 2 is improper.

Continuing on page 2, the Appellees argue that the trial court rejected the Appellant's statement of facts and that evidence before the trial court was conflicting. Both of these assertions are made without any reference to or support in the record. Obviously, these assertions are completely unfounded.

Appellees have enumerated several points in their Statement of the Case and Facts which they assert are supported by the evidence in the record. A review of the more important points 2/ reveals quite the opposite, as will be shown below:

2/ Appellant has not taken issue with all of the factual inaccuracies in the Appellees' Brief because they are too numerous. The issues raised herein relate only to the most serious and glaring factual inaccuracies. The numbered paragraphs herein correspond with the numbered paragraphs in the Appellees' Brief.

1. First, without referring to any point in time, and based upon an undated document and portions of various deposition transcripts, the Appellees assert that Tropigas, S.A.'s Chairman of the Board, President, Treasurer, Secretary and Comptroller are located in Coral Gables, and that these officers work out of offices at 1701 Ponce de Leon Boulevard. However, the Appellees fail to point out that these individuals are also officers of Tropigas International, and that they do not handle the day-to-day operations or the financial and long range planning for Tropigas, S.A. in the office in Coral Gables; rather it is the division managers in each foreign country who are responsible for these activities. (App.A. 66-67). Tropigas, S.A. also has corporate officers in Puerto Rico. (A.A. 15).

Then Appellees, without specifying the pertinent times, claim that 1701 Ponce de Leon Boulevard has been the site of Board of Directors' meetings of Tropigas, S.A. Appellees are trying to create the impression that all meetings were held at this location. This is grossly misleading. The actual testimony is that some of the meetings have taken place in Dade County and when they were in Dade County they were at 1701 Ponce (A.A. 18). Their own citation, at A.A. 150, reveals that the Board of Directors of Tropigas, S.A. met at "various places" including a meeting in Coral Gables; and at A.A. 104, the record shows only that a hypothetical decision posed by Plaintiff's counsel might be made at a Board of Directors' meeting at Ponce. The Chairman of the Board testified that Tropigas, S.A. board meetings would most likely be held in

Puerto Rico (Deposition of Tommie Dean Porter, May 25, 1983, page 39, M.A. 55); in fact, they have been held in Puerto Rico. See, deposition of T. Joseph Perkins, Comptroller, Tropigas International Corp., June 29, 1983, p. 39-40 (M.A. 49). Appellees' assertions are, therefore, merely speculation upon speculation.

2. Here the Appellees' assert that a certain report filed in Puerto Rico states that 1701 Ponce de Leon Boulevard is an office for Tropigas, S.A. However, they fail to point out that the remainder of the address reflected on that report is Hato Rey, Puerto Rico 00919 rather than Coral Gables, Florida, (A.A. 13), and that numerous witnesses whose depositions were taken by the Plaintiff testified that Tropigas, S.A.'s principal place of business is in Puerto Rico. (Deposition of

James I. Bullen, President of Tropigas, S.A., at page 21, M.A. 6; Deposition of Porter, at page 41, M.A. 56). The Appellees also refer to an excerpt of a document filed not by Tropigas, S.A. or its parent, Tropigas International, but by Transway International Corporation. (A.A. 5). This document does not show Tropigas, S.A.'s corporate headquarters to be in Coral Gables, but merely says that "Tropigas" owns the building in Coral Gables in which Tropigas International's executive and general offices are located. It makes no reference to any offices of Tropigas, S.A. This same document points out in an earlier section, (A.A. 2), that the denomination "Tropigas" in that document, for convenience only, refers to Tropigas International Corporation and all

its subsidiaries. 3/ The building at 1701 Ponce in Coral Gables is owned by Tropigas, Inc. of Florida (Deposition of George D. Finley, Financial Manager, Tropigas International Corporation, September 15, 1983, page 74, M.A. 28) and does not house the executive and general offices of Tropigas, S.A. Further, the Appellees fail to face the facts that: Tropigas, S.A. has no employees in the United States, earns no income in the United States, (App.A. 62, 68; Deposition of Jim Bullen at 138, M.A. 21; Deposition of Perkins at 228, M.A. 47) and does not do business in the State of Florida or elsewhere in the United States. (App.A. 63, 68).

3/ This is similar to the practice of using terminology such as ("hereinafter referred to as _____") in pleadings to shorten the name of a referred-to entity, and has no bearing on anything but the document or pleading itself.

3. Appellees begin this point with an admission that the day-to-day operations of Tropigas, S.A. are run by the local managers, but conclude with the unfounded assertion that these managers are hired and fired in Coral Gables. None of the Appendix references referred by the Appellees makes any reference to where managers of the offshore divisions are hired or fired.

4. Here Appellees attempt to describe limitations supposedly imposed on the local managers, and in support, refer the court to two pages of the deposition testimony of Randall Patterson (A.A. 340-341) which have absolutely no relationship to the facts asserted in this point.

5. Then, Appellees grossly misled the court with the implication that all supplies for the operation of Tropigas, S.A. are purchased through 1701 Ponce.

The only supplies which are purchased with the assistance of Tropigas International personnel in Coral Gables are limited to materials which cannot be obtained elsewhere. (Deposition of Porter p. 43 M.A. 57); See also Deposition of Miguel, p. 52, M.A. 38). Additionally Tropigas International charges Tropigas, S.A. for the performance of this service. The factual references used by the Appellees do not explain the minimal quantity of material purchased by Tropigas International as a service to its subsidiary or that the majority of purchases for Tropigas, S.A. are made locally; i.e., in the locale of each division outside the United States. In discovery concerning jurisdictional issues Plaintiffs' counsel made specific inquiry of the President of Tropigas International concerning purchasing as follows:

Q. Where is the purchasing office located for Tropigas, S.A.?

A. In each branch.

Q. Does Tropigas International Corporation make purchases for Tropigas, S.A. out of the Coral Gables branch?

A. A very minute amount of requests, and that is as a service to the branches.

* * *

Q. Why do you say a very minute amount of purchasing is done through the Coral Gables office for Tropigas, S.A.?

A. Because most of the managers are reponsible for their own purchases in that, and they conduct those things themselves, and I say, "a minute amount," because if they can't find something and it is of particular importance to them, they ask for the assistance of Tropigas International. That is not a major function for the people that are handling that.

Deposition of Tommy Dean Porter pp. 43-44; M.A. 57). Most importantly, the Tropigas

International employee in charge of assisting Tropigas, S.A.'s branches in obtaining material in the United States, testified that as best he could recall the total purchases for the S.A. division in Jamaica since 1980 did not exceed $10,000.00. (Deposition testimony of Miguel Miguel at p. 52; M.A. 38). Mr. Miguel further explained as follows:

> Q. What other supplies do you purchase out of the Coral Gables office, for Jamaica?
>
> A. We process orders for whatever items are not available locally. We try to assist them in securing those items.
>
> In the case of Jamaica, it is very, very minimal because they have import restrictions and they have currency controls and more than 90 percent of what they require is purchased locally.

(Deposition of Miguel pages 27, 28, M.A. 36-37). See also, Deposition of Perkins, June 7, 1983, p. 226 (M.A. 46).

Next the Appellees assert that Tropigas, S.A. is represented to be an American company. There is absolutely no support provided by the Appellees for this assertion, and none exists. (A.A. 388). Further, the Appellees' assertion that the "main office copy" of the purchase order is sent to Miami is again completely unsupported in the factual references to which the Appellant's refer the court.

6. Here the Appellees purport to describe the bank arrangements for Tropigas, S.A., begining with an inappropriate factual reference (A.A. 21) to testimony of Robert Stewart taken in 1978 in unrelated litigation, which merely indicates that at that time and previously Tropigas, S.A. had checking or savings accounts in Dade County. However, he went on to testify that he did not know at the time of his deposition whether such

checking accounts were maintained by Tropigas, S.A. (A.A. 21). The use of testimony taken in unrelated litigation in an attempt to support the facts asserted by the Appellees in this case is completely inappropriate. Further, the Plaintiffs' factual references here are misleading, as they fail to explain properly the nature of the banking relationship which S.A. has with the Southeast First National Bank. Appellees should well know this account is actually not maintained in the Southeast First National Bank, but is maintained in a corresponding bank in Nassau and invested in Eurodollars. (Deposition of George Finley p. 41, A.A. 292; Deposition of Randall Patterson, p. 87-88; M.A. 40-41). The funds in this account are kept outside of the United States, in Nassau, and only funds sufficient to cover purchases made

by Tropigas, S.A. in the United States or to pay dividends to Tropigas International are brought into the United States. (Deposition of T. J. Perkins, June 29, 1983, pp. 145-147, M.A. 51-53). The bank accounts maintained by Tropigas, S.A. in Jamaica and other foreign divisions of Tropigas, S.A. are controlled and supervised by the local division managers. (Deposition of Bullen, pp. 18, 49-50; App.A. 84-85; Deposition of Finley, p. 37, A.A. 289).

8. The Appellees suggest that all profits from Tropigas, S.A. are deposited in a checking account at the Southeast Bank; this is inaccurate and not supported by the references given by the Appellees. The profits remitted by the Tropigas, S.A. divisions which are able to remit profits are deposited in an offshore account invested in Eurodollars in Nassau. See

Deposition of Finley, supra at 41. In fact, the last profit received from Tropigas, S.A.'s division in Jamaica was for the year 1978 (Deposition of Perkins, June 7, 1983, p. 212-214, M.A. 43-45).

10. Appellees' next attempt to assert that the dividend decisions for Tropigas, S.A. are made at 1701 Ponce. However, there is no support for that assertion in the text referred to by Appellees.

11. Appellees characterizations here are classic examples of the devious subterfuge that Appellees have engaged in concerning the material facts of this case. By deleting relevant portions of the record, and resorting to inference and speculation, Appellees claim that "contracts for Tropigas, S.A. are negotiated from 1701 Ponce" and that "some of these contracts involve the acquisition of

valves and cylinders." In support of this position Appellees initially refer the court to a page in a deposition taken in 1978 in which there is testimony that it was "possible" that a contract to purchase a truck to be used in Honduras had been negotiated in Florida. (A.A. 31). This record reference appears to refer to a single contract without any explanation as to what type of a contract it is or whether it refers to contracts in general. Not only is this reference ambiguous, it is irrelevant to this case, and therefore, inappropriate. The relevant testimony to be considered by the court is found on page 75 of the Appellees' Appendix. The President of Tropigas, S.A., Mr. Bullen, there testifies that only Mr. Martin, Tropigas, S.A.'s Executive Vice President and Assistant Treasurer, who lives and works in Puerto Rico (A.A. 15), and the

division managers, negotiate contracts for Tropigas, S.A. (A.A. 75). Bullen further testifies that:

> I sometimes become involved in contracts but I never fully negotiate them. These are managers' duties or Mr. Martin's.

(A.A. 75). Roberto Rodezno's testimony, also relied upon by Appellees in support of this point (A.A. 117-118) is limited to an explanation of his involvement in negotiations with the government of Guatamala concerning prices and volume of gas to be supplied. It has absolutely nothing to do with the acquisition of valves and cylinders. (See Deposition of Roberto Rodezno, 21-24, M.A. 61-64). That this is not clear from Appellees' Appendix is not surprising, since they have deleted the intervening pages of Mr. Rodezno's testimony which explains this fact.

Next Appellees mislead the court in suggesting that all purchase orders from

foreign divisions are processed by Tropigas International in Coral Gables Ponce and are reviewed here for technical accuracy. Contrary to this assertion, however, the testimony of Nicholas Lopez referred to by the Appellees (A.A. 418-422), clearly establishes that the only purchase orders reviewed at 1701 Ponce are purchase orders for material from American suppliers which are of a technical nature. See also, Deposition of Miguel (A.A. 397). Appellees' factual assertions in this point are substantially misleading, because they fail to bring to the court's attention that there is no technical review of purchase orders prepared by division managers for purchases outside of the United States. This point is clearly made in the testimony of Mr. Lopez (omitted from Appellees' Appendix) as follows:

Q. When a division manager makes a purchase, an overseas division manager makes a purchase in that country, is that invoice sent to you for review?

A. No.

(Deposition of Lopez, p. 86, M.A. 33). The President of Tropigas, S.A., Mr. Bullen, clearly testified that contracts for Tropigas, S.A. were not negotiated in Coral Gables as follows:

Q. So, it is your testimony that no contracts are negotiated at the Ponce office for Tropigas, S.A.?

A. Not to my knowledge.

Q. Who would have that knowledge?

A. Well, as I don't think that it is being done, I don't think that anyone would?

(Deposition of Bullen at p. 60, M.A. 9). Appellees then advance the proposition that the procedures concerning record-keeping originate in Florida, and that Tropigas, S.A.'s President takes some

steps when local divisions do not comply with record-keeping requirements. These "facts" are wholly unsupported and are deceiving. Pages 47 and 48 in the Appellees' Appendix are cited in an attempt to support this proposition and are excerpts of the testimony of Robert Stewart in which he testifies to the contrary that the record-keeping policies of Tropigas, S.A. have been developed ". . . in a variety of ways . . . over a period of time . . ." with people throughout the Tropigas organization making suggestions for implementation of policies. He also indicates that the record-keeping procedures are not necessarily uniformly followed by the different divisions. (A.A. 47-48). The Appellees follow with a reference to testimony of James Bullen (A.A. 79-82) which does not support their proposition, but establishes to the con-

trary that many record-keeping practices originate in the Tropigas, S.A. divisions so as to comply with local regulations. 4/

Id., at p. 38-39, M.A. 7-8:

> A. No, there may be some guidelines in our office especially for accounting reports, but the policies and the recordkeeping is done by guidelines established by the local manager in accordance with local legal requirements.

12. Appellees' struggle to assert that Tropigas, S.A. maintains an address in Coral Gables, taking out of context the testimony of Mr. Miguel concerning the contents of a purchase order. Mr. Miguel testifies that the purchase order has both the post office box and street address in Coral Gables. However, this witness also testifies as follows:

4/ Of course the deposition page explaining this has again been omitted from the cited portion of Appellees' Appendix.

> Q. So Tropigas, S.A., what is their address in Coral Cables?
>
> A. As far as I know, there is no address for a company "Tropigas, S.A." We are not conducting business in the name of Tropigas, S.A. in Coral Gables.

(Miguel Deposition pp. 18-19; A.A. 388-389). Further, Mr. Porter, the President of Tropigas International testified as follows:

> Q. Does Tropigas, S.A. maintain a P. O. box in Coral Gables?
>
> A. Not to my knowledge.
>
> Q. A mailing address in Coral Gables?
>
> A. Not to my knowledge.

(Deposition of Tommy Dean Porter p. 95, M.A. 59a); See also, App.A. 67). The only reference to a post office box or mailing address for Tropigas, S.A. in Coral Gables arises from purchase orders which are used by Tropigas International

to facilitate those few purchases by Tropigas, S.A. of materials in the United States from suppliers who may be reluctant to sell or ship materials to a company in a foreign country. (See Deposition testimony of Miguel p. 18; M.A. 35).

13. Appellees' here claim that the only engineers employed to give technical advice to the divisions of Tropigas, S.A. are located at 1701 Ponce. This is a fallacy. Although Jose Coterillo and Nicholas Lopez are engineers employed by Tropigas International who provide consulting services when requested to divisions of Tropigas, S.A., these divisions are not required to seek the assistance of these engineers. As Appellees are fully aware, the divisions of Tropigas, S.A. are at liberty to seek technical advice and engineering assistance from sources available in their country.

A. Every local division has access to -- in essence they do sometimes contact the local technical people, the government.

* * * * * * *

Q. So, whatever technical engineering advice is given to the various divisions of Tropigas, S.A., comes out of your office, is that right?

A. Not necessarily. . . . I mentioned before that sometimes the managers have a means of acquiring technical information locally, not necessarily from Miami.

(Deposition of Coterillo A.A. 445-446). See also Deposition of Lopez at p. 62, (omitted from Appellees' Appendix), M.A. 30). Appellees also assert that engineers at 1701 Ponce do "quality control" work in the different divisions of Tropigas, S.A. There is no support for this assertion in the record or the material cited by the Appellees (A.A. 442-443). Mr. Coterillo testified that only if he was asked to

provide quality control services would he do so. He goes on to point out that he has not made recommendations concerning the use of valves and cylinders in Jamaica and that he has not been asked to make recommendations concerning valves and cylinders in Jamaica, because there are government regulations controlling the use of those items. (A.A. 443).

Finally, the Appellees declare that approval of engineers employed by Tropigas International is necessary before a division of Tropigas, S.A. can purchase a new type of valve or equipment. This is directly contrary to the testimony of Mr. Lopez, who explained that when consulted by a division he only makes suggestions, and does not specifically approve or disapprove. (A.A. 415-416). This is echoed in the Deposition of Anthony Autorino, September 15, 1983, who testified that the

decision concerning the type of valve to be used in 1981 rested with the division manager. (Deposition of Autorino, p. 28, M.A. 4).

14. Appellees contend that the Tropigas International engineers, who they allege provide consulting services to Tropigas, S.A., only provide those services in South Florida. The evidence however is that most of the engineering assistance is provided to the divisions in the countries where they operate. For example, Jose Coterillo testified:

> Q. So, you do perform services in Coral Gables for the benefit of these various divisions of Tropigas, S.A.?
>
> A. No, not entirely. Most of the services are performed in the different divisions, as I go there.

A.A. 431, see also, A.A. 459-460; and Deposition testimony of Autorino pp. 17-18; M.A. 2-3). Moreover, it is an uncon-

tested fact that Tropigas, S.A. is charged for these consulting services when they are used. (Deposition of Jim Bullen, p. 73, 137, M.A. 11, 20).

Another of Appellees' completely unfounded contentions is that operational goals are set at 1701 Ponce on an annual basis for the divisions of Tropigas, S.A. Rather, the profit plans, and projections or goals included therein, are established or "set" by the individual division managers and merely presented or discussed at the profit plan meetings.

> Q. What are profit plans and who establishes these plans?
>
> A. Well, the profit plans are what the manager expects his division will perform or come out with in the coming year and they are done basically by the manager and his local staff in each division.

* * * * * *

Q. I don't understand what the function was in Miami with reference to the profit plans.

A. Basically to tell them what we expected to do.

* * * * * *

Q. And before you made your presentation, your presentation was not authorized or approved by anyone including the president of Tropigas, S.A.

A. No.

(Deposition of Roberto Redezno pp. 35-37, M.A. 65-57, noticeably omitted by Appellees). And the president of Tropigas International confirmed that division managers set their own goals:

Q. Who sets the profit goals for the division?

A. The profit goals are set by the division managers.

* * * * * *

Q. How about the profit plan meetings that occur here in Coral Gables with the managers of the various divisions of Tropigas, S.A.,

> isn't that where the profit goals are formulated?
>
> A. No, sir.

(Deposition of Tommie Dean Porter, p. 47; M.A. 59).

15. Appellees' next proclaim that no one outside of Florida has authority over more than one local operation of Tropigas, S.A. This is profoundly inaccurate and is contradicted by the Appellees' next statement which points out that the Puerto Rico office of Tropigas, S.A., negotiates supply contracts which are applicable to more than one local operation. The first reference cited by the Appellees (A.A. 38-39) also reveals the inaccuracy of the Appellees' initial assertion:

> Q. You have told me, sir, that there are various divisions of Tropigas throughout the Caribbean and throughout Central America and that you as president of Tropigas, S.A., are the only person in charge of all these divisions.

A. Yes.

Q. Other than your vice presidents and other people?

A. Right.

(Deposition of Robert Stewart A.A. 38-39).

Appellees' next appendix reference is equally contradictory to their position. Mr. Porter indicated:

Q. When the monitoring process of the various divisions of Tropigas, S.A. uncovers a weakness in one of the divisions, what officer of Tropigas, S.A. has the duty to see that these weaknesses are attempted to be corrected?

A. It would either be Mr. Jim Bullen or Mr. Martin Velez.

Q. Does Mr. Velez monitor the overall operations of all the different divisions of Tropigas, S.A.?

A. Not all of them. Some of them, yes.

(A.A. 190). Appellees' reference to Appendix pp. 215-216 is equally unsupportive of this proposition.

Finally, Appellees try to say that the president of Tropigas, S.A. must approve or disapprove the decisions of the local managers. This is false. The testimony of the Chairman of the Board of Tropigas, S.A. establishes that full authority is delegated to division managers of Tropigas, S.A.:

> Q. Who makes the recommendations to the local divisions?
>
> A. Nobody makes recommendations to the local divisions. The local divisions originate and that in turn brings it to us.
>
> Q. Who is "us"?
>
> A. To Tropigas, S.A. or to Tropigas International Corporation.
>
> Q. And they ask permission from Tropigas International Corporation or Tropigas, S.A. as to whether or not they can implement a certain policy or procedure in their local operation?
>
> A. No, no, they have the authority. We delegate the

authority to those people to make such types of decisions. We just monitor the company.

Q. Well, what authority do you delegate to them?

A. I delegate to them that they are as equal as the chief operating officers for those particular branches. They have full authority down there to hire, to fire, etc.

(A.A. 173-174, emphasis supplied). Mr. Bullen also testified as follows:

Q. So, you, as president of Tropigas, S.A., supervise the various managers and the various divisions of Tropigas, S.A. around the Caribbean and Latin America?

* * * * * * *

A. No, sir, I don't supervise them. I receive the reports - they advise me what is going on at times but I don't get into the nitty-gritty and supervise, no.

They receive no supervision from me.

(A.A. 72).

16. In Appellees' last attempt to pervert the facts Appellees include a telex concerning a new addition to the Tropigas International staff in 1982, over a year after this accident. On that point, appellees conveniently ignore that Mr. Bullen testified, at page 135 of his deposition (M.A. 19), that this addition was a new position. It did not even exist at the time of the alleged incident, and is irrelevant to this Court's consideration.

What then follows is a string of activities which are supposedly carried on by Tropigas, S.A. in this forum, followed by another string of citations which only can be said to support these allegations in the fertile imagination of Appellees. However, an examination of these citations reveals that there simply is no support for these propositions. For example,

Appellees assert that valves and cylinders are repaired in the United States. Their first actual citation is to the 1983 deposition of Robert Stewart, who testified that he was not sure whether Tropigas, S.A. had cylinders or valves repaired in the United States. (A.A. 52). Then, at A.A. 392, also cited by Appellees, we find that Miguel, head of the Tropigas International purchasing department, testified as follows:

> Q. Is it your testimony that you have never purchased any cylinders for Jamaica out of the Coral Gables office?
>
> A. That's right.

Regarding Appellees' claim that approval or disapproval for purchase of valves must be obtained from Coral Gables, Nicholas Lopez testified to the contrary:

> Q. Then would you give your approval or disapproval of a particular valve that was

wanted to be used by Tropigas, S.A.?

A. No.

(A.A. 416).

With regard to the responsibility for safety, rather than the president of Tropigas, S.A. being responsible for safety in the offshore divisions, as Appellees have represented, we find that it is the local managers instead. Thus, Mr. Bullen testified, at pages 94-95 of his deposition, as follows:

Q. Is there one individual in Tropigas, S.A. responsible for the safety throughout the division?

A. Responsible for the safety?

* * * * * *

A. No, the local manager is responsible for safety.

* * * * * *

Q. There is no one individual that is responsible for safety in all of the divisions?

A. That is correct.

(M.A. 14-15). And, at page 97 of his deposition, Bullen further testified:

> Q. I mean, as president of Tropigas, S.A., you must rely on the safety procedures established by Tropigas International through Mr. Lopez and the operations managers in the various divisions of Tropigas, S.A., is that correct?
>
> * * * * * * *
>
> A. No, I rely on the safety procedures established in the country in accordance to the regulations in these countries.
>
> I rely on the local manager to assure that these procedures are indeed applied.

(M.A. 16). With regard to the repair of cylinders used in Jamaica, which Appellees assert is done in the United States, Mr. Bullen testified as follows on page 64 of his deposition:

> Q. Does Tropigas, S.A. arrange for the repair of cylinders used in Jamaica in the United States?

A. No.

Q. Has that ever been done, to your knowledge?

A. To my knowledge, I don't know.

Q. You are unaware of any of the cylinders that are used in Jamaica being repaired in the United States?

A. I am completely unaware.

Q. Who would be involved in such affairs in either Tropigas International or Tropigas, S.A.?

A. I really don't know. It sounds so far out, I don't know.

(M.A. 10). See also the Deposition of Nick Lopez, who testified:

Q. Where are the cylinders used in Jamaica repaired?

A. The hundred pound cylinders, they are repaired in an outside shop.

Q. In Jamaica or outside Jamaica?

A. In Jamaica."

(Lopez Deposition, p. 80; M.A. 32). With regard to who selects the valves that are to be used in their own individual countries, rather than being approved here, as Appellees claim, again we find that it is the responsibility of the division managers. Thus, Mr. Bullen testified at pages 87-88 of his deposition, as follows:

> Q. Who decides what valves are to be used on the 25 pound tanks in Jamaica?
>
> A. The Jamaican manager.
>
> Q. Has he always performed that function to your knowledge?
>
> A. To my knowledge, yes."

(M.A. 12-13). Appellees' assertions to the contrary notwithstanding, Tropigas, S.A. in Jamaica purchases its cylinders in Jamaica, not the United States. Mr. Bullen confirmed this at pages 103-104 of his deposition:

Q. Where is the Tropigas Jamaica purchasing their cylinders at the present time?

A. From another cylinder manufacturer in Jamaica.

Q. What manufacturer is that?

A. It is a local company. I don't recall the name.

Q. Who oversees those purchases?

A. The local manager.

Q. Who supervises the local manager in those purchases?

A. He works jointly with the local operations manager.

Q. Do you oversee these purchases?

A. No.

Q. Who determines how many cylinders should be purchased and when?

A. The local manager.

(M.A. 17-18). And, at page 148 of his deposition, Mr. Bullen again explains that it is local management that has the sole

decision-making power over what type of valve to use in its operation:

> Q. The purchasing department at Tropigas International does that or has it had a decision-making role as to what type of valve would be used in any particular country, including Jamaica?
>
> A. To my knowledge, no.
>
> Q. Are you aware currently of any department of International that has decision-making powers in reference to what type of valve to use?
>
> A. Local management is the only one.

(M.A. 26). Mr. Bullen is not the only one to testify as to these matters. Nick Lopez testifies at pages 79-80 of his deposition:

> Q. Do you know who in Tropigas, S.A. Corporation makes the decisions with reference to the sale, design, storage, maintenance or inspection of L.P. gas products?

* * * * * *

A. The local managers.

Q. Do you know anybody else?

A. Besides the local managers?

Q. Yes.

A. No.

(M.A. 31-32).

Rather than the picture Appellees have attempted to paint, we find the true picture in the testimony of Jim Bullen, which has been carefully excluded from the Appellees' Appendix:

> Q. Mr. Bullen, referring to the Jamaican division of Tropigas S.A., who makes the decisions concerning hiring and firing of employees in that Jamaican division?
>
> A. The local manager.
>
> Q. Who selects the distributors of Tropigas products for the S.A. division in Jamaica?
>
> A. The local manager.

* * * * * *

Q. Who determines the manner of local distribution of Tropigas products in Jamaica?

A. The local manager.

Q. Who selects retail outlets for Tropigas products in Jamaica?

A. The local manager.

Q. Who establishes the salaries of Tropigas employees in Jamaica?

A. The local manager.

Q. Who establishes the working conditions for Tropigas in Jamaica?

A. The local manager.

Q. Who makes the decisions associated with the acquisition of the equipment, plant, office space and other facilities in Jamaica?

A. The local manager.

Q. Who makes decisions concerning the repair and maintenance of office and plant facilities in Jamaica?

A. The local manager.

Q. Who makes decisions concerning the maintenance and acquisition or other handling of equipment used in Tropigas' business in Jamaica?

A. The local manager.

Q. Who determines the hours of operation of Tropigas facilities in Jamaica?

A. The local manager.

Q. Who makes decisions for vacation of the employees in Jamaica?

A. The local manager.

Q. Who establishes and maintains local marketing plans and strategies in Jamaica?

A. The local manager.

Q. Who assures that Tropigas complies with the local government regulations and health standards in Jamaica?

A. The local manager.

Q. Who pays taxes and licensing fees, if any, in Jamaica?

A. The local company.

Q. Who handles the bookkeeping and accounting for the division in Jamaica?

A. The local accounting department.

Q. Who pays the salaries and expenses of the operation of Tropigas S.A. in Jamaica?

A. The local companies.

Q. Are those salaries and other expenses paid with funds from bank accounts in Jamaica?

A. Yes, sir.

Q. Who handles complaints that customers may make concerning Tropigas operations in Jamaica?

A. The local manager.

Q. Who is responsible for maintaining--excuse me--for managing the Tropigas S.A. personnel in Jamaica?

A. The local manager.

Q. Who is responsible for acquiring the LPG and other products sold by Tropigas S.A. in Jamaica?

A. The local manager.

(Deposition of Jim Bullen, pp. 139-142, M.A. 22-25). Thus, Appellees' "statement of the case and facts" is nothing but sheer argument, for which Appellees have reached outside the record, and their brief must certainly be stricken.

MEMORANDUM OF LAW

Rule 9.210(c), Florida Rules of Appellate Procedure provides that Appellees' Answer Brief shall be prepared in the same manner as the Initial Brief. Section (b)(3) of that rule, regarding initial briefs provides:

> References to the appropriate pages of the record or transcript shall be made (emphasis added).

Appellees have utterly disregarded the dictates of this rule, and their brief should be stricken.

In Dayton Tire & Rubber Co. v. Davis, 348 So. 2d 575, (Fla. 1st DCA 1977), quashed and reversed on other grounds, 358 So. 2d 1339 (Fla. 1978), the court explained the purpose of the precedessor to Rule 9.210(b)(3) requiring reference to pages of the record and suggested a sanction for its violation:

> The purpose of that rule is to guide the judges of the court, when reading the briefs, to the relevant portions of the record to resolve conflicts and confusion in the assertions contained in the briefs. It would not be inappropriate, upon a finding of a flagrant disregard of that rule, for the court to strike the parties' brief.

The rule also helps alert the parties and the appellate court to attempts to go outside the record. Accordingly, the Florida Supreme Court in Pawley v. Pawley, 37 So. 2d 247 (Fla. 1948) granted a motion to strike a brief because the "history of the case" which, under Supreme Court Rule

20 was to be limited to a recital of facts with appropriate references to the transcript, contained argument and undue elaboration relating to matters in controversy.

Statements made in Appellees' brief which are flatly contradicted in the actual record or are simply unsupported there should be stricken as an attempt to go outside the record. In Maistrosky v. Harvey, 133 So. 2d 103 (Fla. 2d DCA 1961), the court granted appellant's motion to strike appellee's brief for reciting matters which were not contained in the record. See also, Sheldon v. Tierman, 147 So. 2d 593 (Fla. 2d DCA 1962); Foge v. Mirmelli, No. 80-1680 (Fla. 3d DCA, Order Striking Brief filed May 6, 1981), M.A. 68.

Inconsistencies between the statements made in Appellees' brief and the appendix must cause this Court concern.

The court in Seaboard Air Line Railroad Company v. Harnes, 269 So. 2d 392 (Fla. 4th DCA 1972), stated that in the preparation of an appellate brief, counsel should never portray a factual situation to the court as having been established without qualification by the record when the evidence in the record conflicts with that portrayal.

It is an equally well established rule that Florida's appellate courts will not hesitate to strike entire briefs for failure to cite to pages of the record. See, e.g., Davis v. Sails, 306 So. 2d 615 (Fla. 1st DCA 1975). Also, once this Court determines that the brief contains misstatements of the record or testimony, which are not within the record on appeal, striking the offensive portions of the appellate brief may be appropriate. Cf. Raybon v. Burnette, 135 So. 2d 228, 229-230 (Fla. 2d DCA 1961).

Appellees' initial brief violates the rules and principles essential for orderly appellate review. Many statements of "fact" are made without reference to the attached appendix; many statements are entirely unsupported by the appendix, or are contradicted by the same; many of the statements cited are wholly unsupported by the pages referred to; and finally, many misleading and clearly false assertions are made.

Briefs such as the one complained of in this motion were striken by the court in Axtell v. Lyons, 105 So. 2d 610 (Fla. 1st DCA 1958). In Axtell, the court noted that although the violations complained of had not caused appellee to suffer any material detriment at that time, the language of the rules governing preparation of briefs on appeal was clear and observance of the rules was essential to

the orderly functioning of the courts. Id. at 611. Appellees' disregard for the dictates of the appellate rules in the case at bar has already caused, and will continue to cause, undue labor for both this Court and Appellant. It should not be condoned.

CONCLUSION

The flagrant disregard shown here by Appellees epitomizes the purpose of the appellate rules. The subtle danger of improperly swaying this Court with matters that are outside the record or that are not accurate makes Appellees' efforts even more deplorable. Here the Appellant and the Court must search the Appendix from the beginning to end to discover that "facts" stated by Appellees are not supported by the Appendix to which Appellees refer the court.

In an effort to develop a factual basis for jurisdiction, the Appellees have taken eighteen depositions in this case, transcripts of which contain approximately 2,000 pages of testimony. In the Appendix which the Appellees have filed in support of the "facts" they allege or assert in the Answer Brief, they have included various documents and exerpts of some depositions. However, some of these depositions were taken years before the incident which gives rise to this lawsuit and were not taken in this case. The Appellees' Appendix includes numerous other exerpts of testimony which do not fairly present the evidence given by the witness. Further, the Appellees fail to alert the Court, even in the Index to the Appendix, that they are referring only to small portions of the depositions. In many cases, particularly with reference to

the testimony of James Bullen, Tommie Dean Porter, and Joseph Perkins, it is not possible to verify the accuracy of the Appendix, because the Appellees have failed to include the deposition page numbers. The entire form and presentation of the material in the Appellees' Appendix is misleading and improper.

Because the Appellees rely extensively on numerous exerpts of deposition testimony, they should be required to submit complete copies of the deposition testimony relied upon in their Appendix, so that the Court may be properly apprised of the complete testimony of these witnesses. Further, the deposition transcripts offered concerning testimony taken in other litigation several years before the incident which is the subject of this litigation should be stricken and expunged from the record.

The inaccuracies and misrepresentations in the Appellees' statement of the case and facts are pervasive and infect their entire Brief. Violations of the Florida Rules of Appellate Procedure may be punished by the elimination of the offending portions of the brief or, when such violations pervade the entire brief, by striking the brief as a whole. Rule 9.410, Florida Rules of Appellate Procedure. Such a sanction is the appropriate action here.

WHEREFORE, Appellant respectfully requests that this Court strike Appellees' initial brief.

Respectfully submitted,

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By: /s/ Brooks C. Miller
for Christian D. Keedy

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of February, 1984 to: Robert J. Dickman, P.A., Suite 302, 4675 Ponce de Leon Boulevard, Coral Gables, Florida 33146; Robert J. Black, Esquire, 420 South Dixie Highway, Coral Gables, Florida 33146; Sam Daniels, Esquire, 1414 duPont Building, 169 East Flagler Street, Miami, Florida 33131; and Debra L. Brady, Esquire, 169 East Flagler Street, Miami, Florida 33131.

CHRISTIAN D. KEEDY, P.A.

By: /s/ Brooks C. Miller
for Christian D. Keedy